



## LIBRARY OF CONGRESS

### Copyright Office

#### 37 CFR Part 201

[Docket No. RM 2012-4]

### Electronic filing in the Copyright Office of Notices of Intention to obtain a Section 115 compulsory license

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of Proposed Rulemaking.

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**SUMMARY:** The Copyright Office is proposing to amend its regulations for filing Notices of Intention to obtain a Section 115 compulsory license with the Copyright Office to provide an option for electronically filing the notice. By law, such notices may be filed in the Office only when the public records of the Copyright Office do not identify the copyright owner of the musical work and include an address at which notice can be served. In addition, the Copyright Office is proposing to clarify in its regulations that it does not examine Notices of Intention filed with the Office for legal sufficiency and to include a Privacy Act Advisory Statement.

**DATES:** Comments are due no later than 5:00 pm Eastern Daylight Time [insert date 45 days from publication of this notice in the **Federal Register**].

**ADDRESSES:** The Copyright Office strongly prefers that comments be submitted electronically. A rulemaking page containing a comment form is posted on the Copyright Office Web site at <http://copyright.gov/docs/section115/efilings/comments/>. The Web site interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browse button. To meet

accessibility standards, all comments must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter and organization should appear on both the form and the face of the comments. All comments will be posted publicly on the Copyright Office Web site exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Copyright Office at 202–707–8380 for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Tanya Sandros, Deputy General Counsel, or Stephen Ruwe, Attorney-Advisor, Copyright GC/I&R, P.O. Box 70400 Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Section 115 of the Copyright Act, 17 U.S.C., provides that “[w]hen phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person . . . may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.” 17 U.S.C. 115(a)(1).

Included among the conditions that must be met to use the Section 115 compulsory license is the requirement that a person who wishes to obtain a compulsory license “shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner. If

the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention in the Copyright Office. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.” 17 U.S.C. 115(b)(1).

In 2004, the Copyright Office (“Office”) amended 37 CFR 201.18, the regulations governing Notices of Intention to obtain a Section 115 compulsory license (“Notices”), in order to make the license more functional. 69 FR 34578 (June 22, 2004). Among the 2004 amendments to 37 CFR 201.18 was a provision that allowed that a Notice “may designate any number of nondramatic musical works, provided that the copyright owner of each designated work or, in the case of any work having more than one copyright owner, any one of the copyright owners is the same and that the information required under paragraphs (d)(1)(i) through (iv) of this section does not vary [*i.e.*, name and contact information of licensee; name and contact information of primary entity making and distributing phonorecords, and information concerning yearly accounting periods]. For purposes of this section, a Notice which lists multiple works shall be considered a composite filing of multiple Notices and fees shall be paid accordingly if filed in the Copyright Office under paragraph (f) of this section (*i.e.*, a separate fee, in the amount set forth in § 201.3(e)(1), shall be paid for each work listed in the Notice).” 37 CFR 201.18(a)(4). The 2004 amendments also allowed licensees to serve Notices directly on copyright owners or designated agents by means of an electronic transmission when the copyright owner or designated agent has a written public policy that it can accommodate such submissions. 37 CFR 201.18(a)(7).

Earlier in the 2004 rulemaking process the Office also considered whether to allow a licensee to file a Notice in the Office in an electronic format. The Office determined that it was not prepared to accept electronically filed Notices because it did not have in place the systems that would accommodate such filings but that the Office anticipated that such filings would be accepted in the future. The Office did provide that in the case where the licensee intends to license a high volume of nondramatic musical works under section 115 and would endure significant hardships if required to submit the Notices under the standard practices, the licensee may contact the Licensing Division of the Copyright Office to inquire whether special arrangements could be made for submission of the Notice electronically. 69 FR 11566, 11570 (March 11, 2004).

The Office is aware of a growing need for an electronic filing system for filing Section 115 Notices with the Copyright Office because of the large number of works being used under the compulsory license where service of the Notice cannot be made effectively on the copyright owner. To meet this need, the Office is now preparing to accept specific types of electronically filed Notices addressing multiple nondramatic musical works. Hence, the Office is proposing to amend its regulations in § 201.18 by providing for use of an online system for submission of Notices covering multiple nondramatic musical works.

## **II. Proposed Procedures and Regulatory Amendments**

The Office proposes to amend its regulations to allow prospective licensees to make electronic filings of Notices addressing multiple nondramatic musical works, provided that the information required under paragraphs (d)(1)(i) through (iv) of § 201.18

does not vary. In addition, the Office is proposing to clarify its rules for submission of Notices in a paper format that contain multiple titles of nondramatic musical works.

The Office has reviewed the Notices recently filed with the Licensing Division in the traditional paper format and observed that parties have filed such Notices that address multiple works for which the public records of the Office do not identify the copyright owner. Although paragraph (d)(1)(v)(C) of § 201.18 requires that a Notice include the copyright owner of the work only “if known,” the Office has not questioned Notices filed in a paper format addressing multiple works where such “unknown” ownership is shared across each work addressed in the Notice, *i.e.*, no copyright owner can be identified for any of the works listed. Such paper filings do not present a problem for the Office to process. The Office is now entering key pieces of information, e.g., name of the song, licensee, and date received, from the Notice into a spreadsheet (currently located on the Copyright Office webpage at <http://www.copyright.gov/licensing/115.pdf>), making it possible to identify easily who filed a Notice for a particular work. However, because the current rules do not expressly address the Office’s acceptance of Notices with multiple titles in the case where no copyright owner of any of the works can be identified, the Office proposes to amend its regulations to clarify that a Notice filed in a paper format may list multiple works in a single Notice when any of the following circumstances apply: in the case where no copyright owner can be identified from the Copyright Office records for any of the works listed in the Notice; in the case where the copyright owner of each work listed in the Notice is the same and the records of the Copyright Office do not include an address at which notice can be served; or for works having more than one copyright owner, in the case where the works listed in the Notice share a common

copyright owner and the records of the Copyright Office do not include an address at which notice can be served on any of the copyright owners for the subject works. The Office is maintaining these distinctions for the paper filings at this time because it provides more concise information to the public reviewing the Notices and facilitates the recordkeeping process for the Office.

The Office has also determined that Notices addressing multiple nondramatic musical works may be submitted electronically as XML files. Electronically submitted Notices will be maintained in a database that can be searched using any of the included fields of information. While the search capability of the electronically filed Notices will not be directly available to the public for technical reasons during the initial rollout of this service, a request may be made to the Licensing Division for a search of the database during the interim period. As such, the Office proposes to allow Notices to be filed in the Office in electronic format regardless of whether the copyright owner of each designated work is the same, provided that the Notice does not include a nondramatic musical work when the identity and address of at least one of its copyright owners may be found in the public record of the Copyright Office.

As part of the process of accepting electronically filed Notices, the Office is also proposing to adopt regulations governing payment for electronically filed Notices in order to provide a means to authenticate the licensee submitting the Notice (see below) and to facilitate an efficient implementation of the interim system. Specifically, the Office is proposing that during the introduction of the online filing process, parties that wish to use the Office's online system for electronically filing Notices be required to maintain a deposit account pursuant to § 201.6(b) of the Copyright Office regulations for

payment of the Notice filing fees set forth in § 201.3(e)(1) of the Office's regulations, an option that can be easily implemented. *See* Circular 5: How to Open and Maintain a Copyright Office Deposit Account at: <http://www.copyright.gov/circs/circ05.pdf>. Use of a deposit account will allow the Office to make any necessary fee payments immediately and it avoids the need to solve the technological and security issues associated with providing a credit card payment in this first iteration of the system.

In addition, the Office proposes not to require an electronic signature during the initial rollout of the filing process, although the Office anticipates adding an electronic signature requirement in later versions of the system. Instead, a remitter will have to create an online account to file the Notice electronically and, as noted above, provide payment via a Copyright Office deposit account. The Office is adopting this approach because the online system will be able to use the deposit account information to reasonably verify and authenticate the identity of the person submitting and validating Notices. In addition, the Office will require that the person submitting the Notices provide contact information and attest to his or her authority to file Notices on behalf of the subject Licensee.

In order to accommodate a filer of a Notice identifying only one or a few titles who does not have a deposit account, the Office intends in the future to upgrade the online filing system to require an electronic signature and to accept additional payment options, e.g., credit card payments. At the moment, however, the focus is on offering a mechanism for filing Notices with large numbers of titles in a manner that can easily be administered by the Office at this time. The Office is also reviewing its fee for filing Notices as part of a larger project to review its fees for registration and services. Any

changes to the fees for filing Notices of Intention to Obtain a Compulsory License will be addressed in that process. *See* 77 FR 18742 (March 28, 2012).

### **III. Additional amendments**

The Office is also taking this opportunity to clarify the extent to which the Office examines the Notices. First, the Office does not examine Notices for legal sufficiency. Rather, the determination of whether a Notice filed in the Office is sufficient as a matter of law under this section shall, if necessary, be made by a court of competent jurisdiction. For that reason, a person or entity filing a Notice of Intention to obtain a Section 115 compulsory license should take care to comply with all the statutory and regulatory requirements pertaining to such Notices. However, the Office will notify a prospective licensee when a Notice was not accompanied by payment of the required fee. Such a Notice is considered an incomplete submission and the Notice shall be deemed filed only as of the date the Office has received both the Notice and the applicable fee.

In addition, the Office is proposing to amend its regulations for Notices to include a Privacy Act Advisory Statement in § 201.18 in addition to providing this information on its website. The Privacy Act Advisory Statement fulfills the Office's obligation to notify the public that Notices with personally identifying information filed with the Office become public records.



#### **IV. Pilot Program**

While the Office is proposing to amend its regulations to accept electronic filing of the Section 115 Notices of Intent to Obtain a Compulsory License, it needs to fully test the system before making it available to the public for actual, valid submissions of Notices. Thus, members of the public are invited to participate in a Beta test of the proposed electronic system. Parties wishing to participate in Beta testing should contact Tracie Coleman in the Licensing Division of the Copyright Office at 202-707-3600, tmau@loc.gov. The Beta testing will require participants to upload “test” Notices to the Beta version of the electronic system to ensure proper functionality. “Test” Notices uploaded during the Beta testing phase will not require the submission of a filing fee, and they will not have any legal effect or otherwise be considered valid for licensing purposes. The Beta testing will be limited to selected participants until system testing is complete.

#### **V. Conclusion**

The Copyright Office hereby seeks comment from the public on the proposals identified herein concerning Notices of Intention to obtain a Section 115 compulsory license.

#### **List of Subjects in 37 CFR Part 201**

Copyright

#### **Proposed Regulation**

In consideration of the foregoing, the Copyright Office proposes to amend part 201 of 37 CFR as follows:

## **PART 201—GENERAL PROVISIONS**

1. The authority citation for part 201 continues to read as follows:

**Authority:** 17 U.S.C. 702.

2. Amend § 201.4(a)(1)(iii) by removing “Original, signed notices” at the beginning of the paragraph and adding “Notices” in its place.
3. Amend § 201.18 as follows:
  - a. By revising paragraph (a)(4);
  - b. By adding a new paragraph (e)(5);
  - c. By redesignating paragraph (g) as new paragraph (h);
  - d. By adding a new paragraph (g);
  - e. By adding a new paragraph (i).

The additions and revisions to § 201.18 read as follows:

### **§ 201.18 Notice of intention to obtain a compulsory license for making and distributing phonorecords of nondramatic musical works.**

**(a)** \* \* \*

**(4)** A Notice of Intention shall be served or filed for nondramatic musical works embodied, or intended to be embodied, in phonorecords made under the compulsory license. For purposes of this section and subject to subparagraphs (ii) and (iii), a Notice filed with the Copyright Office which lists multiple works shall be considered a single Notice and fees shall be paid in accordance with the fee schedule set forth in § 201.3(e)(1) if filed in the Copyright Office under paragraph (f)(3) of this section. Payment of the applicable fees for a Notice submitted electronically under this paragraph shall be made through a deposit account established under § 201.6(b).

(i) Except as provided for in paragraph (a)(7), a Notice of Intention served on a copyright owner or agent of a copyright owner may designate any number of nondramatic musical works provided that that the information required under paragraphs (d)(1)(i) through (iv) of this section does not vary and that the copyright owner of each designated work is the same, or in the case of any work having more than one copyright owner, that any one of the copyright owners is the same and is the copyright owner served.

(ii) A Notice of Intention filed in the Copyright Office in paper form may designate any number of nondramatic musical works provided that that the information required under paragraphs (d)(1)(i) through (iv) of this section does not vary, and that the copyright owner of each designated work (or, in the case of works having more than one copyright owner, any one of the copyright owners) is the same and the registration records or other public records of the Copyright Office do not identify the copyright owner(s) of such work(s) and include an address for any such owner(s) at which notice can be served. For purposes of this subparagraph, in the case of works having more than one copyright owner, a single Notice must identify an actual person or entity as the common copyright owner; the common copyright owner may not be identified as “unknown.” However, a single Notice may include multiple works for which no copyright owners can be identified for any of the listed works.

(iii) A Notice of Intention filed in the Copyright Office in electronic format may designate multiple nondramatic musical works, regardless of whether the copyright owner of each designated work (or, in the case of any work having more than one copyright owner, any one of the copyright owners) is the same, provided that the

information required under paragraphs (d)(1)(i) through (iv) of this section does not vary, and that for any designated work, the records of the Copyright Office do not include an address at which notice can be served.

\* \* \* \* \*

(e) \* \* \*

(5) If the Notice is filed in the Office electronically, the person or entity intending to obtain the compulsory license or a duly authorized agent of such person or entity shall, rather than signing the Notice, attest that he or she has the appropriate authority of the licensee, including any related entities listed, if applicable, to submit the electronically filed Notice on behalf of the licensee.

\* \* \* \* \*

(g) *Filing date and legal sufficiency of Notices.* The Copyright Office will notify a prospective licensee when a Notice was not accompanied by payment of the required fee. Notices shall be deemed filed as of the date the Office receives both the Notice and the fee, if applicable. If the prospective licensee fails to remit the required fee, the Notice will be deemed not to have been filed with the Office. However, the Copyright Office does not review Notices for legal sufficiency or interpret the content of any Notice filed with the Copyright Office under this section. Furthermore, the Copyright Office does not screen Notices for errors or discrepancies and it does not generally correspond with a prospective licensee about the sufficiency of a Notice. If any issue (other than an issue related to fees) arises as to whether a Notice filed in the Copyright Office is sufficient as a matter of law under this section, that issue shall be determined not by the Copyright Office, but shall be subject to determination by a court of competent jurisdiction.

Prospective licensees are therefore cautioned to review and scrutinize Notices to assure their legal sufficiency before filing them in the Copyright Office.

(h) *Harmless errors.* Harmless errors in a Notice that do not materially affect the adequacy of the information required to serve the purposes of section 115(b)(1) of title 17 of the United States Code, shall not render the Notice invalid.

(i) *Privacy Act Advisory Statement.* The authority for receiving the personally identifying information included within a Notice of Intention to obtain a compulsory license is found in 17 U.S.C. 115 and § 201.18. Personally identifying information is any personal information that can be used to identify or trace an individual, such as name, address or telephone numbers. Furnishing the information set forth in § 201.18 is voluntary. However, if the information is not furnished, it may affect the sufficiency of Notice of Intention to obtain a compulsory license and may not entitle the prospective licensee to the benefits available under 17 U.S.C. 115. The principal uses of the requested information are the establishment and maintenance of a public record of the Notices of Intention to obtain a compulsory license received in the Licensing Division of the Copyright Office. Other routine uses include public inspection and copying, preparation of public indexes, preparation of public catalogs of copyright records including online catalogs, and preparation of search reports upon request.

Dated: May 18, 2012

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Maria A. Pallante,  
Register of Copyrights

**[BILLING CODE 1410-33]**

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